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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF W.R. HAMBRECHT + CO., LLC, FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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W. R. Hambrecht + Co., LLC ("Hambrecht")[1] hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consents to the filing of this *amicus* brief have been obtained from counsel of record for petitioner, Credit Suisse Securities (USA) et al. and counsel of record for the respondent, Glen Billing. The consent of Russel H. Beatie was requested, but has not been received.

The interest of Hambrecht in this case arises from the fact that it is a full-service investment bank and is a proponent of the next generation system of underwriting securities, known as the OpenIPO auction. Hambrecht launched the OpenIPO auction in 1999. By combining auction theory with the internet in the form of an Internet-based Dutch auction, the OpenIPO auction provides both access (any qualified investor has an opportunity to bid for shares) and transparent pricing (the offering price is determined based on the actual demand for shares). Under the OpenIPO auction, share allocations are determined by reference to the price that each bidder is willing to pay for the offered shares. Since 1999, Hambrecht has conducted 17 OpenIPO deals.

As an innovator in the IPO field, Hambrecht has a direct concern with the interaction between the antitrust laws and the statutory scheme for regulating public offerings of securities, an interaction that lies at the heart of the legal issues posed by this case. The Court's determination of the

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1. W.R. Hambrecht + Co., Inc. is the parent holding company and sole member of three limited liability company subsidiaries: W.R. Hambrecht + Co., LLC, a broker dealer; W.R. Hambrecht + Co. Asset Management, LLC, a registered investment advisor; and W.R. Hambrecht Ventures I Management, LLC, the manager of a venture capital fund.

proper scope of implied antitrust immunity with regard to conduct involved in the IPO process will affect securities underwriters, including innovators such as Hambrecht.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF W.R. HAMBRECHT + CO., LLC AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is submitted by W.R. Hambrecht + Co., LLC ("Hambrecht"), as *amicus curiae* in support of petitioners.[1]

1. In accordance with Supreme Court Rule 37.6, it is noted that the undersigned counsel for Hambrecht authored this brief in its entirety and that no person or entity other than Hambrecht has made a monetary (Cont'd)

W.R. Hambrecht + Co., Inc. is the parent holding company and sole member of three limited liability company subsidiaries: W.R. Hambrecht + Co., LLC, a broker dealer; W.R. Hambrecht + Co. Asset Management, LLC, a registered investment advisor; and W.R. Hambrecht Ventures I Management, LLC, the manager of a venture capital fund.

INTEREST OF HAMBRECHT AS AMICUS CURIAE

The interest of Hambrecht in this case arises from the fact that it is a full-service investment bank and is a proponent of the next generation system of underwriting securities, known as the OpenIPO auction. Hambrecht launched the OpenIPO auction in 1999 and has conducted 17 OpenIPO deals. This method is the only existing alternative to the traditional underwriting process for issuance of new securities. As such, it represents the next generation in capital formation for securities underwriting. By combining auction theory with the internet in the form of an Internet-based Dutch auction,[2] the OpenIPO auction provides both access (any

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contribution to the preparation or submission of this brief. The consents to the filing of this *amicus* brief have been obtained from the attorneys for petitioner, Credit Suisse Securities (USA) et al. and the attorneys for the respondent, Glen Billing. The consent of Russel H. Beatie was requested, but has not been received.

2. Dutch auction, also known as descending price auction, uses a bidding process to find an optimal market price for the stock, the lowest price at which an issuing company can sell all the available shares. . . . Named after the famous auctions of Dutch tulip bulbs in the 17th century, it is based on a pricing system devised by Nobel Prize winning economist William Vickrey.

See http://www.investorwords. com/1603/Dutch_auction.html.

qualified investor has an opportunity to bid for shares), and transparent pricing (the offering price is determined based on the actual demand for shares). These concepts are the core principles of the OpenIPO auction, an auction system in which allocations are determined by reference to the price that each bidder is willing to pay for the shares.

The OpenIPO auction method is designed and intended to eliminate underpricing by obtaining a price that is closer to the actual market price. It is also designed to lead to less volatility in share price and a stable initial shareholder base, thereby benefiting both the issuers and the buyers of securities. Moreover, the OpenIPO auction protects the issuer and the underwriter from any potential liability for "underpricing" an initial public offering because the price is determined by the issuer and the underwriter based on a transparent analysis of demand. In an OpenIPO auction, the underwriters do not have the potential of an undisclosed conflict of interest because the underwriters do not control allocation of the securities. Instead, shares are awarded to successful bidders based solely on the price they bid and are awarded on a pro rata basis. The efficacy of the OpenIPO auction can be seen in its results.

The interaction between the antitrust laws and the statutory scheme for regulating public offerings of securities is at the heart of the legal issues posed by this case. Greater clarity in delineating the scope of implied antitrust immunity with regard to conduct involved in the IPO process will greatly affect innovators in this area such as Hambrecht and help to create a climate increasingly hospitable to Hambrecht's OpenIPO auction process.

SUMMARY OF ARGUMENT

Hambrecht supports petitioners' request that the respondents' claims be dismissed with prejudice. As the Court of Appeals acknowledged, many of the Complaint's allegations describe collaborative conduct in the capital formation process that the Securities and Exchange Commission (the "SEC") permits. Such authorized conduct, and conduct that is inextricably linked to such SEC approved conduct, should be deemed immune from antitrust challenge. The Court of Appeals erred in rejecting petitioners' immunity defense for all of the conduct set forth in the Complaint.

The Complaint's allegations regarding tie-in and laddering agreements should also be dismissed. These allegations are conclusory, and are contained in the background section of the Complaint. The Complaint is without doubt based in essence upon allegations of immune conduct, and all of the allegations are intertwined. Given the often subtle distinction between permissible and prohibited conduct in this area, involving refinements appropriately delegated to the SEC, and given the SEC's exercise of its regulatory authority with respect to the specific conduct at issue here, the Court of Appeals erred in declining to dismiss the entire Complaint based on implied immunity.

Hambrecht believes that greater clarity with regard to the issues presented in this case — which broadly involve the interaction of the antitrust laws with the regulatory scheme administered by the SEC, and the scope of implied antitrust immunity — would help to create an increasingly hospitable climate for Hambrecht's innovative Open IPO auction process.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN FAILING TO GRANT IMPLIED ANTITRUST IMMUNITY TO PERMISSIBLE UNDERWRITING CONDUCT

A leading commentator has observed that "[m]ost regulatory statutes say nothing at all about the impact of the regulatory regime on antitrust jurisdiction. In these cases, any limitation on or exemption from antitrust must be considered as implied rather than express . . . [and] the domain of the antitrust exemption is narrow." Herbert Hovenkamp, *Federal Antitrust Policy, The Law of Competition and Its Practice*, 716 (3rd ed., Thompson/West 2005). As this Court has stated, "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963).

However, the securities laws and regulations administered by the SEC permit, and in certain instances encourage, an array of collaborative conduct among underwriters and issuers. This Court has long recognized the need for a "proper reconciliation of the regulatory and antitrust statutes." *Gordon v. NYSE*, 422 U.S. 659, 685 (1975).[3] Indeed, the Court explained earlier in *Silver v. NYSE*,

3. *See Id.* at 689

> to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their

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373 U.S. 341, 357 (1963), that the "proper approach" to a claim of antitrust immunity on the basis of another regulatory statute "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." As the Solicitor General points out, the antitrust laws should be understood as having been impliedly repealed with respect to SEC authorized collaboration among underwriters in the IPO process. *Sol. Gen. Br.* at 10.[4]

Although the Court of Appeals acknowledged that conduct authorized under the securities statutes is immune from antitrust liability, it declined to give full effect to that immunity, thereby exposing petitioners to the burden of having to defend themselves against costly antitrust litigation — carrying the possibility of treble damages — based on conduct permitted under the securities laws. The Court of Appeals erred by treating the Complaint's many specific factual allegations of authorized conduct "as an issue to be addressed solely as a matter of evidence."[5] *Id.* at 8. The Solicitor General correctly notes:

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> members to conflicting standards. It is clear . . . that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC. If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC.

4. Citations herein to "Sol. Gen. Br. at __" refer to the brief filed by the Solicitor General in this action at the request of the Court pending consideration of the Petition for Writ of Certiorari.

5. The Court of Appeals acknowledged in its opinion that the Complaint "details a host of conduct recognized as legitimate by the

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> [A] complaint's generalized allegations of conduct prohibited under the regulatory scheme should not preclude dismissal on immunity grounds if the complaint's allegations to that effect ultimately rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permitted activities, because such conduct is impliedly immune from antitrust liability.

Id. at 8. Moreover, we agree with the Solicitor General's conclusion that: "It is of paramount importance that the capital formation process in this county not be undermined by the threat of treble damages liability based on conduct inextricably linked to the collaborative activities authorized and regulated by the SEC under the Securities laws." *Id.*

(Cont'd)

SEC — in particular, the use of syndicates and the book-building process." *Pet. App.* 61a n.47. Although it reversed the district court's finding of immunity, and remanded for further proceedings, the Court of Appeals was careful to "leave the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities." *Id.* Thus, while the Second Circuit did not focus its opinion on the host of "legitimate activities" alleged in the Complaint, implicit in the above remarks is the suggestion that such activities should be deemed immune and the allegations related to them dismissed, thereby "ensuring that the defendants do not suffer prejudice." *Id.* Hambrecht submits, however, that this implicit suggestion should have been made explicit in the Court of Appeals' ruling, *i.e.*, the district court's dismissal of the Complaint's allegations of "legitimate activities" should have been upheld.

Syndicated underwriting is "an essential means" by which underwriters share risks in public securities offerings. *Pet. App.* 5a. This system "inherently involves agreements and joint actions among potential (and actual) competitors, including agreements about price that, but for the securities regulatory regime, would raise substantial antitrust concern." *Id.* at 192a. Congress was aware of the syndicated underwriting system when it enacted the Securities Act of 1933 and the Securities Exchange Act of 1934. Indeed, the legislative and regulatory history reveal that Congress favored regulation of syndicated underwriting, not proscription. *See generally id.* at 4a-16a, 133a-136a. The authorized collaborative activities involved in forming and operating underwriting syndicates should therefore be deemed impliedly immune from the antitrust laws.

Indeed, as the government's filings in the lower courts pointed out, and the Court of Appeals acknowledged, many of the Complaint's specific allegations describe practices which the SEC permits, and in certain instances encourages, as part of the capital formation process. These practices include:

- forming into underwriting syndicates;
- collaborating as members of exchanges and trade associations;
- agreeing that the lead underwriters will distribute all shares;
- agreeing that all syndicate members will share in the underwriter's discount;
- conducting meetings among investment bankers, legal officers and market makers; and

- disclosing information regarding each underwriter's IPO customers.

See Pet. App. 154a-155a, 177a, 206a-207a (referring to conduct alleged in *Am. Compl.* ¶¶ 38, 39, 45-48, 56, 62).

Such authorized conduct should undoubtedly be deemed immune from antitrust challenge. For example, in *Gordon v. NYSE*, 422 U.S. 659, private plaintiffs sought to impose antitrust liability for the fixing of commissions pursuant to exchange rules. Implied immunity from the antitrust laws was held to exist, however, because the SEC had "thoroughly exercised its supervisory powers" over the system of fixed commissions, 422 U.S. at 688, and had approved the use of fixed rates, 422 U.S. at 667-675, 689-690. This Court explained that although the SEC had never issued a formal order requiring fixed rates, its actions had "an effect equivalent to that of a formal order." *Id.* at 689 n.13. Similarly, *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1995) ("*NASD*"), involved a challenge to vertical restrictions on mutual fund sales and distribution which would have been illegal *per se* under the antitrust laws. 422 U.S. at 729, 733. Although the activities at issue were not specifically required or approved by the SEC, they were nonetheless deemed immune because they were "designed to encourage . . . precisely the restriction that the SEC consistently ha[d] approved pursuant to [statute] for nearly 35 years." *Id.* at 733.

In Hambrecht's view, the Court of Appeals erred in not upholding the district court's dismissal of the Complaint with respect to allegations of collaborative conduct approved by the SEC and therefore entitled to immunity from the antitrust laws. Moreover, immunity should be granted to related conduct that "cannot practically be separated from authorized conduct."

Sol. Gen. Br. at 10.[6] Indeed, "[f]ailure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme." *Id.*

II.

THE COURT OF APPEALS ERRED IN NOT UPHOLDING THE DISMISSAL OF THE COMPLAINT'S INSUFFICIENT BACKGROUND ALLEGATIONS CONCERNING TIE-IN AND LADDERING AGREEMENTS

The Court of Appeals directed its immunity analysis at the Complaint's general allegations that petitioners had engaged in tie-in and laddering practices, which are unlawful under the securities laws.[7] The Solicitor General's brief,

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6. Thus, for example, in *NASD*, 422 U.S. at 733-734, this Court held that horizontal agreements among competing NASD members to encourage vertical restraints in the mutual fund secondary market were entitled to implied immunity because the vertical restraints imposed by such horizontal agreements had been consistently approved by the SEC. *See Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 729 (9th Cir. 1981) (then Judge Kennedy explaining that the court in *NASD* had "reasoned the concerted activity had acquired a kind of derivative immunity by virtue of its relation to the immune restraints implemented by the concerted action.")

7. As the Solicitor General's Brief points out, with regard to allegations of tie-in and laddering agreements, "there is no legislative history suggesting an intent to immunize such conduct nor would application of the antitrust laws to such conduct be inconsistent with or render nugatory any provision of the securities laws." *Sol. Gen. Br.* at 7.

however, has aptly pointed out a significant deficiency in respondents' pleading that confirms the error of the Court of Appeals:

> In this case, it is particularly difficult to discern whether respondents have adequately pleaded non-immune anticompetitive conduct sufficient to overcome the immunity defense, because the allegations of forbidden tie-in and laddering agreements are largely confined to more conclusory assertions in the background section of the complaint, whereas the more specific factual allegations concerning the alleged unlawful agreements detail conduct that is (or might be) immune.

Sol. Gen. Br. at 11.[8]

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8. The Complaint's reliance on protected conduct and its intermixing of conclusory allegations that petitioners engaged in prohibited anticompetitive conduct with more detailed allegations of collaborative conduct approved by the regulatory authority cannot overcome petitioners' implied immunity defense. "Especially when a particular element critically distinguishes innocuous (or, indeed, desirable) conduct from wrongdoing, allegations concerning that element must be concrete, rather than conclusory." *See Brief for United States, Bell Atlantic Corp. v. Twombly*, 126 S. Ct. 2965 (2006) (No. 05-1126 at 12). Moreover, "[w]hether a statement of a claim is sufficient to give fair notice depends in part on the complexity of the case." 2 James Wm. Moore et. al., *Moore's Federal Practice* §8.04[1][a], at 8-24.1 (3d ed. 2006). Thus, in cases of "magnitude" a court "must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

Thus, respondents in their "Summary of Allegations," *Am. Compl.* 1, allege that petitioners engaged in "laddering" by "agree[ing] to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and significantly inflate the aftermarket prices of IPO's." Yet, in a later section of the Complaint spelling out the more specific laddering allegation, respondents assert that during "road shows" and in other contacts with customers before the IPO, petitioners "at times jointly, made inquires of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." *Id.* ¶ 54. The latter allegation, however, can delineate bookbuilding conduct that the SEC has specifically permitted. *See Pet. App.* 227a-228a (SEC's April 2005 guidance authorizing inquiries "as to customers' desired future position in the longer term, for example, three to six months, and the price or prices at which the customers might accumulate that position," while noting that, in contrast, "inquir[ing] whether the customer intends to place orders in the immediate aftermarket, and if so, at what price and quantities" constitutes an impermissible tie-in).

The SEC has engaged in expert line-drawing with respect to the conduct alleged in this case of precisely the type that the doctrine of implied immunity is designed to accommodate. Moreover, the precise, expert line-drawing required in this area to distinguish between permissible, authorized conduct and impermissible, illegal conduct is, we submit, better left to the regulatory agency with the desired expertise, rather than relegated to private actions, juries, and

courts wielding the blunt instrument of treble damages under §4 of the Clayton Act.[9]

Indeed, even if the Court does not accept the "pervasive regulation" theory asserted in petitioners' certiorari petition, the SEC has engaged in expert line-drawing with respect to the *specific* conduct at issue. Petitioners have pointed out:

> To the extent the alleged tie-in conduct might violate the securities laws, the SEC is "actively pursuing" a comprehensive regulatory respons[e]." App., *infra*, 127a. The Commission and the NASD investigated IPO allocation practices following the market bubble and have filed and settled actions against several investment banks. *Id.* at 137a-138a. Each of those actions alleged that the investment bank engaged in one or more of the IPO allocation practices challenged here, involved alleged violations of Regulation M or NASD Conduct Rule 2110, and settled without an admission or denial of liability. E.g., *SEC v. Credit Suisse First Boston* (Jan. 22, 2002), www.sec.gov/ litigation/litreleases/lrl7327.htm; see App., *infra*, 196a. In addition, the SEC has established a blue-ribbon panel to recommend rule changes. *Ibid.* To date the SEC has proposed

9. *See, e.g., Gordon*, 422 U.S. at 689-690

> Given the expertise of the SEC, the confidence the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme.

> amendments to Regulation M prohibiting underwriters from receiving consideration from IPO customers above the offering price of a security. Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004). It also is reviewing proposed SRO rule changes addressing "quid pro quo allocations" of IPO stock. Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004). See App., *infra*, 137a-139a, 194a-197a.[10]

Petitioners' Petition for a Writ of Certiorari at 7.

Given the often subtle distinction between permissible and prohibited conduct in this area, involving refinements appropriately delegated to the SEC, and given the SEC's exercise of its regulatory authority with respect to the specific conduct at issue here, the Court of Appeals erred in declining to grant implied immunity for the conduct alleged in the Complaint. Moreover, because the Complaint is based in essence upon allegations of immune activity, the Court of Appeals erred in its blanket rejection of petitioners' immunity defense for all of the conduct set forth in the Complaint.

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10. The SEC's rule making with regard to preferential allocation of shares has been deferred until April, 2007. http://www.nasd.com/RulesRegulation/RuleFilings/2003RuleFilings/NASDW_001118. It should be noted that a version of this Rule making, 10b20, was first proposed in 1974-75 and was withdrawn by the SEC in 1988.

CONCLUSION

Hambrecht supports the maintenance and development of competitive markets for capital formation in securities underwriting. Competitive markets in securities underwriting promote efficiencies and innovations, such as the OpenIPO auction, and consumer welfare, thus helping to effectuate the principal goal of the antitrust laws and to reinforce the very foundation of our economic liberty.

In accordance with the arguments set forth in this *amicus* brief, Hambrecht respectfully supports the petitioners' request that the decision of the Court of Appeals be reversed.

Respectfully submitted,

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